

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNETH DEWAYNE JONES,

Defendant and Appellant.

B190882

(Los Angeles County
Super. Ct. No. TA 077113)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Tammy Chung Ryu, Judge. Affirmed.

William L. Heyman, under appointment by the Court of Appeal, for Defendant
and Appellant.

Bill Lockyer and Edmund G. Brown Jr., Attorneys General, Mary Jo Graves and
Dane R. Gillette, Chief Assistant Attorneys General, Pamela C. Hamanaka, Assistant
Attorney General, Lawrence M. Daniels, Kathy S. Pomerantz and Sarah Farhat, Deputy
Attorneys General, for Plaintiff and Respondent.

In December 2004, Kenneth Dewayne Jones entered an open no contest plea to one count of making a criminal threat. (Pen. Code, § 422.) On August 3, 2005, the trial court suspended imposition of sentence and placed Jones on three years of formal probation with credit for eight months served.

At his probation violation hearing on April 28, 2006, Jones admitted violating probation. He requested to be sentenced immediately and agreed to the court's use of the pre-plea probation report despite the court's expressed desire to order an updated version. The court sentenced Jones to the upper term of three years in state prison for his conviction for making a criminal threat.

Jones appealed, claiming the upper term sentence was improper under *Cunningham v. California* (2007) 549 U.S. 270, 127 S.Ct. 856, because he did not receive a jury trial on the facts used to impose the upper term. We held that by waiving his right to a jury trial, knowing he was risking imposition of a three-year state prison term, Jones had waived the right to a jury trial of sentencing factors in aggravation. (*People v. Jones* (Feb. 22, 2007, B190882) [nonpub. opn.].)

The Supreme Court granted review (*People v. Jones*, review granted May 9, 2007, S151379) and ultimately remanded the matter to this court with directions to vacate our decision and to reconsider the cause in light of its decision in *People v. French* (2008) 43 Cal.4th 36.

In *People v. French*, *supra*, 43 Cal.4th 36, the defendant was charged with 12 counts of lewd and lascivious conduct with a child under the age of 14 years, involving three victims. (Pen. Code, § 288, subd. (a).) The defendant pleaded no contest to six of the counts under an agreement whereby he would receive a sentence of no more than 18 years in prison with the remaining counts dismissed. (*Id.* at pp. 41-42.) The trial court sentenced the defendant to the upper term of eight years on count one, and to one-third of the six-year midterm on each of the other five counts, with all terms to be served consecutively, for a total term of 18 years. The trial court selected the upper term on the ground the defendant “took advantage of a position of trust and confidence to commit the crime pursuant to [California Rules of Court, rule 4.421(a)(11)].” (*Id.* at p. 43.)

The defendant appealed, claiming that the upper term was not authorized because the prosecution failed to establish the aggravating circumstance at the sentencing hearing in the manner required by the Sixth Amendment. The Supreme Court agreed, and held that “in pleading no contest pursuant to a plea agreement providing for a sentence not to exceed a stipulated maximum and further stipulating to a factual basis for the plea, defendant neither waived his right to a jury trial on aggravating circumstances nor admitted facts that established an aggravating circumstance[,] and . . . imposition of the upper term sentence violated defendant’s Sixth Amendment right to a jury trial[.]” (*People v. French, supra*, 43 Cal.4th at p. 41.) The *French* Court found that the record did not contain sufficient evidence to establish as an aggravating factor that the defendant had abused a position of trust, and thus found that the error was not harmless beyond a reasonable doubt. It reversed the decision of the Court of Appeal affirming the defendant’s sentence with directions to remand the matter for resentencing. (*Id.* at pp. 54-55.)

In the present case, in contrast, the trial court’s selection of the upper term did not constitute Sixth Amendment error because the court based its sentencing decision on Jones’s prior convictions. As the *French* Court noted, “[e]ven without a jury trial on aggravating circumstances, the upper term would have been authorized if the prosecution had established an aggravating factor at the sentencing hearing based upon defendant’s prior convictions or upon his admissions. (See *People v. Sandoval* (2007) 41 Cal.4th 825, 836-837)” (*People v. French, supra*, 43 Cal.4th at p. 45.)

Jones terminated the evidentiary portion of the probation revocation hearing, admitted he violated probation by committing his current offense of forcible rape, and requested to be sentenced immediately. The prosecutor then reviewed Jones’s probation report and noted as aggravating circumstances that (1) Jones’s convictions as an adult were of increasing seriousness, (2) Jones had served a prior prison term, and (3) his prior performances on probation and parole had been unsatisfactory. The trial court also reviewed the probation report and commented that Jones had been convicted of a misdemeanor offense in 1987, and a federal felony offense in 1991, for which he received

a five-year prison sentence and four years' formal parole. The court additionally commented that the probation report indicated Jones had committed several parole violations after his release from federal prison.

The record in this case reflects that the trial court selected the three-year upper term sentence based on Jones's record of prior convictions and his poor performance on parole as reflected in the probation officer's report and by Jones's admission at the probation revocation hearing. The upper term sentence imposed in this case thus did not violate Jones's Sixth Amendment right to jury trial of aggravating circumstances. (*People v. French, supra*, 43 Cal.4th at p. 54; *People v. Towne* (2008) 44 Cal.4th 63; Pen. Code, § 1170, subd. (b) [a trial court may base its sentencing decision on the record in the case and the probation officer's report, among other sources]; Cal. Rules of Court, rule 4.420(b) [same].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

JACKSON, J.*

* Associate Justice of the Court of Appeal, Second Appellate District, Division Seven, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.